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KIMBERLY-CLARK WORLDWIDE, INC.
401 NORTH LAKE STREET
NEENAH, WI 54956

EXAMINER

REICHLE, KARIN M

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/017,894
Filing Date: December 14, 2001
Appellant(s): DATTA ET AL.

MAILED

JUN 11 2007

Group 3700

Sebastian C. Pugliese III
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 4-6-07 appealing from the Office action mailed 7-6-06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,957,908	KLINE et al	09-1999
4,946,527	BATTRELL	08-1990

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Language Interpretation

“Disposable” is defined as set forth on page 11, lines 19-21. Although not explicitly defined in the specification, “prefastened”, in light of the disclosure at page 2, lines 3-30, and page 8, lines 29-31, as originally filed, is considered as configured when fasteners are attached, i.e. a pant-like configuration, to be pulled up or down over the hips of a wearer, i.e. prior to application to the wearer, but does not require forming of such configuration during the manufacturing process. The terms “multiple property”, and “non-abrasive” have not been specifically defined and therefore will be accorded their common, i.e. dictionary, definition. Thus, “multiple property” is defined as having more than one property, i.e. any property. “Non-abrasive” is defined as not “causing abrasion, harsh; rough”, not “to rub off or wear away by friction”. With regard to the term “mechanical fastening material”, see page 9, lines 2-3, as originally filed, and page 22, lines 7-10. See also Section 10), infra.

Ground 1):

Claims 2, 9-10, 15-17 and 22 are rejected under 35 U.S.C. 102(b) as anticipated by Kline et al ‘908 (and thereby, Battrell ‘527).

Claim 22, first full paragraph: see Claim Language Interpretation section supra, and Kline at Figures 1-3, elements 20, 28, 40, 42, 44, 46, 48, 50 and 52, col. 2, first full paragraph, col. 3,

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lines 11-13, the Summary of the Invention section, col. 17, lines 7-13 and col. 25, line 39-col. 26, line 4.

Claim 22, second full paragraph: It is noted that the engagement ability of the first and second materials has not been claimed, i.e. could be the same, nor is it claimed that the engagement zone is abrasive, i.e. both zones could be nonabrasive, equally so or not. The claim does not require that the one zone be non-abrasive due to only the second material. The claim also does not require that the materials be non-unitary, that each zone includes only the one material, that each zone be entirely covered by the respective material or that the first and second materials have to be different compositions. The zones as claimed could be two zones of the same composition. The claim does not require the zones be nonabrasive or engaging only because the material thereof is of the claimed modulus, i.e. could be so due to other factors, e.g. the zone(s) being positioned so it is nonabrasive or engaging, or other factors in combination with the modulus. It is furthermore noted that the criticality of the combination of materials with specific ranges of moduli of the scope claimed, see discussion infra, has not been disclosed, see page 23, line 9-page 27, line 27 of the instant specification. Page 23, line 9-page 27, line 27 disclose the flexure modulus as being merely one of the factors determining the strength of engagement or abrasiveness, but do not set forth the specific strengths or softnesses attained due such factors. Such disclosure merely sets forth that the properties of engagement and abrasiveness of the two fastening materials are not the same, i.e. the disclosure sets forth that one material engages stronger than the other and the other is less abrasive than the other due to a number of factors. It is noted that claim 22 does not even set forth this relative relationship of properties between the two fastening materials.

The Kline patent teaches a fastener, 62 or 64, with 202, which has a longitudinal direction, a lateral direction and multiple properties, see, e.g., col. 16, lines 34-62, i.e. different strengths and permeabilities, or col. 17, lines 32-37, and thereby Battrell '527 at col. 2, line 13-17 and col. 7, lines 64-67, i.e. has both the property of sheer stress resistance and peel force which can be different in various portions. See also, e.g., col. 18, lines 7-9 and col. 22, lines 17-19 of Kline. The Kline patent teaches at least one engagement zone of a first mechanical fastening material and at least one engagement zone of a second mechanical fastening material, see, e.g., col. 23, lines 9-13 and col. 17, line 14-col. 18, line 6, i.e. multiple zones of mechanical fastening material, and/or Figure 7, col. 16, lines 30-62, col. 17, line 14-col. 18, line 6, col. 18, lines 8-9 and col. 22, lines 17-19, e.g. zones 253 and 254 which can include mechanical fastening material, and/or col. 17, lines 14-18 and 32-37, and thereby Battrell '527 at Figures 1-2, col. 7, line 37-col. 8, line 2, col. 10, lines 61-64, col. 11, lines 53-55, and col. 12, lines 13-24, i.e. mechanical fastening material having different zones due to nonuniform pattern, size, spacing, density and/or composition. The Kline device also teaches at col. 22, lines 9-12 the desire that the fasteners, i.e. all the zones, do not irritate the wearer's skin. Since "irritate" is defined as "to chafe or inflame" and "chafe" is defined as "to wear away or irritate by rubbing", the fasteners are "nonabrasive", see Claim Language Interpretation section supra. Therefore, the Kline et al reference clearly teaches all the claimed structure and function except the polymeric materials comprising the first and second fastening materials having different specific ranges of flexure modulus. It is noted that the flexure modulus is that, i.e. a property, of the polymeric material. It is noted that the first polymeric material range, at a minimum, is required to be merely greater than about the maximum flexural modulus of the second polymeric material

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range, i.e. can be nearly identical. As disclosed by Kline et al/Battrell, see cited portions supra, the fasteners can have first and second zones of different fastening capability but skin friendly with fastener shape, size, material composition, and/or density identical or substantially identical to those set forth in the instant specification, e.g. note again page 4, lines 3 et seq of this Answer supra, esp. page 23, line 9-page 27, line 27 of the instant specification and the discussion of the claims infra. Therefore, it is the Examiner's first position that there is sufficient factual basis (i.e. the structure and function disclosed by Kline/Battrell is identical or substantially identical to that disclosed and/or claimed but for the explicit recitation of the claimed modulus, i.e. the flexure modulus of the polymeric material comprising the first and second fastening materials) for one to conclude that the materials of the zones as taught by Kline et al, i.e. the fastening materials, inherently include the same properties as that of the claimed fastening materials when tested similarly.

Claim 2: It is noted that the longitudinal directions of the fastener and the article are not required to be parallel. Note, again, Figure 7, col. 16, lines 30-62, col. 17, line 14- col. 18, line 6, col. 18, lines 8-9 and col. 22, lines 17-19, i.e. the Kline patent teaches a fastener area, i.e. any portion of the fastener, the zone 253 or a portion thereof and an equal and adjacent portion of zone 254 can include the engaging component 202 and such zone 253 or portion thereof and equal portion of zone 254 define the fastener area. Attention is again invited to the discussion of the scope of the language of the second full paragraph of claim 22 supra.

Claim 9: See col. 17, lines 62-63, and lines 32-37 of Kline, and thereby col. 8, lines 40-41 of Battrell '527.

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Claim 10: See col. 17, lines 32-37 of Kline, and thereby col. 8, lines 30-56 of Battrell '527.

Claim 15: See Figure 3 of Kline.

Claim 16: See, e.g., col. 21, lines 5-16 and Figure 2 and col. 12, lines 26-29 of Kline, i.e. the landing member would be identical to the fastener of claim 22, discussed supra, and thus would engage the engaging component of the rear waist region.

Claim 17: See, e.g., Figures 2, 3 and 7.

Ground 2):

Claims 2, 9-10, 15-17 and 22 are rejected under 35 U.S.C. 103(a) as obvious over Kline et al '908 (and thereby, Battrell '527).

See the discussion of claim 22 in Ground 1) supra. In any case, the Examiner's second position, the teachings of Kline/Battrell teach the general conditions of the claim, i.e. multiple properties, engaging, nonabrasive, materials are not the same, materials having a flexure modulus (all materials have a flexure modulus). Therefore it would have been obvious to one having ordinary skill in the art at the time the invention made to employ a first and second fastening materials as claimed, i.e. materials comprised of polymeric materials as claimed, since it has been held that where the general conditions of a claim are disclosed, as here, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233. See also section 10) infra.

(10) Response to Argument

Claim Language Interpretation:

With regard to the arguments concerning the claim language interpretation on pages 3-5 of the Brief, which are substantially the same as those earlier presented, such arguments have been considered again but are still deemed not persuasive because such arguments are still narrower than the definition of the terminology clearly/explicitly set forth in the specification and/or the claim language and/or the teachings of the prior art. For example, while the terminology “prefastened” as set forth by the specification can include forming the configuration during manufacture, it is not limited thereto by the specification or claim language because nowhere is such explicitly set forth, and while it is disclosed that such configuration is provided prior to application, prior to application does not require only during manufacture, i.e. broadest not most specific interpretation is given where as here there is no explicit definition provided, i.e. compare to the explicit definition provided for “disposable”, and the specification describes the terminology/invention such that more than one interpretation is possible. Likewise, other portions of the specification relied upon by Appellants’ in their arguments with regard to other definitions, e.g. “multiple properties”, “non-abrasive”, “mechanical fastening material”, do not explicitly describe the contended term is limited to that as argued. Nor does the claim language set forth the terms as argued by Appellants’. For example, the claims do not require the claimed multiple properties being fastening related or what they are limited to. For another example, “When the mechanical fastening material is a hook-type material” at page 5, lines 29-32 of the specification does not require at least a hook-type material as argued but rather sets forth the

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situation where such is the case, i.e. infers there are situations where such is not the case, i.e. the material is not hook-type.

Ground 1:

With regard to the arguments with regard to the prior art rejection on pages 5-6 of the Brief, which are substantially the same as those earlier presented, attention is reinvited to the rejection *supra* in section 9) for Examiner's complete position.

Appellants' remarks with regard to anticipatory rejections on page 6, line 17-page 7, second to last line of the Brief, which are substantially the same as those earlier presented, have been noted again but are still deemed not persuasive because, e.g., they are narrower than the prior art rejection *supra*, and the teachings of the prior art. Flexure modulus is a property of the structure claimed, i.e. the polymeric material comprising the fastening material. As disclosed by Kline et al/Battrell, see cited portions *supra* (Battrell for example teaches fasteners having zones of fastener material wherein the zones include different polymeric materials, e.g. one zone can include uncoated aberrations of polymeric material, i.e. first material, and another zone can include coated aberrations of polymeric material, i.e. a second polymeric material), the fasteners can have first and second zones of different fastening capability but skin friendly with fastener shape, size, material composition, and/or density identical or substantially identical to those set forth in the instant specification, e.g. note again page 4, lines 3 et seq of this Answer *supra*, esp. page 23, line 9-page 27, line 27 of the instant specification and the discussion of the claims *supra*. Appellants' have not provided any evidence showing that such prior art does not necessarily possess the characteristics/properties of the claimed product when tested similarly as

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rejected supra. It is noted that the first polymeric material range, at a minimum, is required to be merely greater than about the maximum flexural modulus of the second polymeric material range, i.e. can be nearly identical, i.e. each include moduli which are substantially similar, i.e. about 30 and greater than about 30, e.g. about 30 and about 30.000001.

Therefore the rejection of claims 2, 9-10, 15-17 and 22 under 35 U.S.C. 102(b) as anticipated by Kline et al '908 (and thereby, Battrell '527) is deemed proper and maintained.

Ground 2):

Appellants' remarks with regard to obviousness rejections on page 7, second to last line-page 10, line 1 of the Brief, which are substantially the same as those earlier presented, have been noted again but are still deemed not persuasive, e.g., they are narrower than the prosecution record, and the teachings of the prior art. The remainder of the arguments directed to the requirement of recognition by the art that the variable of flexure modulus is a result effective variable and that the Examiner has not shown where the Kline patent discloses such is not persuasive because the property of flexure modulus relates to the rigidity or hardness, or conversely, the flexibility or resilience and softness of materials, e.g. prior art must recognize that properties of fasteners, e.g. engagement, skin friendliness, is a function of such property, i.e. of rigidity and hardness or flexibility, resilience and softness, and it was pointed out/shown where the Kline patent recognizes such, i.e. see page 9, lines 7-8 of the FINAL, e.g., col. 17, lines 32-37 and col. 24, lines 46-49 of Kline and the last paragraph of col. 5 and col. 7, lines 11-23 of Battrell.

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Therefore the rejection of claims 2, 9-10, 15-17 and 22 under 35 U.S.C. 103(a) as obvious over Kline et al '908 (and thereby, Battrell '527) is deemed proper and maintained.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

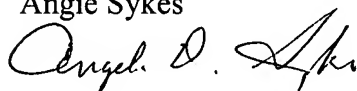
Respectfully submitted,

K. M. Reichle



Conferees:

Angie Sykes



Tanya Zalukaeva

**TATYANA ZALUKAEVA
SUPERVISORY PRIMARY EXAMINER**

